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Honorable Samuel J. Steiner, Judge  
Hearing Location: Seattle Courtroom 8206  
Hearing Date: February 26, 2010  
Hearing Time: 9:30 a.m.  
Response Date: February 19, 2010

8  
9  
10 **UNITED STATES BANKRUPTCY COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON**

11 In re:

12 JACK CARLTON CRAMER, JR.,

13 Debtor.  
14

**CHAPTER 7 BANKRUPTCY**

**Case No. 09-15167-SJS**

**DEBTOR'S RESPONSE TO  
MOTION FOR RELIEF  
FROM STAY**

15 **I. Introduction**

16 COMES NOW the Debtor, Jack C. Cramer, Jr., by and through his attorney Helmut Kah, and  
17 hereby responds to the Motion for Relief from Stay filed by Litton Loan Servicing which is scheduled  
18 for hearing on Friday, February 19, 2010.

19 Before the court is a motion for relief from the automatic stay of § 362(a) to enforce a deed of  
20 trust on the Debtor's residence.

21 The motion is brought by the law firm of Routh Crabtree Olsen, P.S., in the name of  
22 "Residential Funding Real Estate Holding, LLC through its servicing agent Litton Loan Servicing, LP  
23 its successors in interest, agents, assigns and assignors ("Creditor")"

24 The motion is neither brought in the name of the real party in interest, nor by anyone with

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**DEBTOR'S RESPONSE TO MOTION FOR RELIEF FROM STAY**

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standing, therefore the motion for relief from stay should be DENIED.

For the sake of clarity and style, the moving parties herein are referred to as follows:

Litton Loan Servicing, LP: "Litton"

Residential Funding Real Estate Holding, LLC: "RFREH"

## II. Summary

The motion for relief from stay is supported solely by the affidavit of a person identified as Nancy Rexford, Bankruptcy Specialist for Litton Loan Servicing. Attached to her two-page declaration are unauthenticated copies of:

1. Adjustable rate note dated December 22, 2001, Lynnwood, Washington, providing for an initial interest rate of 11.50% adjustable to a maximum rate of 17.5%;
2. Adjustable rate mortgage note addendum dated December 22, 2001;
3. Note Allonge reciting "pay to the Order of PRISM MORTGAGE COMPANY" purportedly signed by one Ronald Barzano, Assistant Vice President, Mortgage Market, Inc., an Oregon Corporation;
4. Note Allonge reciting "pay to the Order of COUNTRYWIDE HOME LOANS, INC." purportedly signed by one Ronald Barzano, Assistant Vice President, Prism Mortgage Company, an Illinois Corporation, on which appears what looks like a rubber stamp endorsement in blank by Countrywide Home Loans, Inc.;
5. Deed of Trust dated December 22, 2000 in favor of Mortgage Market, Inc., an Oregon Corporation (as "Lender"); the beneficiary is identified as Mortgage Electronic Registration Systems, INC. ("MERS"), a Delaware Corporation, solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns, with an adjustable rate rider.

The motion mentions the automatic stay, touches upon issues of standing, real party in interest, holder, holder in due course, and note indorsed in blank. It mentions the Debtor's bankruptcy filing, the Debtor's alleged default, provides an estimate of the obligation, mentions other liens and the value of the property, argues that "Creditor" is entitled to relief under § 362(d)(1) & (d)(2), and request that this Court enter an order terminating the stay, and asks that the provisions of F.R.B.P. 4001(a)(3) be waived.

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1 The Creditor's proposed order includes provisions that are neither requested nor argued for in the  
2 motion.  
3

4 No evidence is provided, nor is any assertion even made, regarding Litton's authority to act for  
5 the holder of the note, beyond the unelaborated statement that the motion is brought by Litton as  
6 servicing agent for RFREH.

7 Debtor objects to Litton's motion on the basis that neither Litton nor RFREH are shown to be  
8 the holder of the promissory note nor the real party in interest and, therefore, have no standing to bring  
9 this motion.

10 Furthermore, the Creditor has submitted no evidence whatsoever in support of the factual  
11 assertions made under Sections V and VI of the motion.  
12

### 13 **III. Issues**

#### 14 **A. Real Party in Interest**

15 Is a "servicing agent" the real party in interest in whose name a relief from stay motion may be  
16 brought?

#### 17 **B. Standing**

18 Do either Litton or RFREH have standing to seek relief from stay to enforce Debtors' deed of  
19 trust?

### 20 **IV. Analysis**

#### 21 **A. Real Party in Interest**

22 The motion names the moving party as "Residential Funding Real Estate Holding, LLC through  
23 its servicing agent Litton Loan Servicing, LP its successors in interest, agents, and assignors  
24 ("Creditor").

Who is the party bringing this motion? Is it Residential Funding Real Estate Holding, LLC? Is

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1 it Litton Loan Servicing, LP? Or is it some combination of either or both entities' or their "successors in  
2 interest, agents, and assignors"?

3  
4 The real party in interest in relief from stay is whoever is entitled to enforce the obligation  
5 sought to be enforced. It follows that orders granting relief from stay must do so to the holder of the  
6 obligation to be enforced - not the servicer or others, or the collective "Creditor" as in the proposed  
7 order submitted by movant.

8 **B. Standing**

9 Litton has submitted no evidence that it is authorized to act for whomever holds the note, or that  
10 RFREH is the holder of the note. These deficiencies put the "Creditor"'s standing in question, See *In*  
11 *re Parrish*, 326 B.R. 708, 720-21 (Bankr. N.D. Ohio 2005). The Court has an independent duty to  
12 determine whether it has jurisdiction over matters that come before it. *FW/PBS, Inc. v. City of Dallas*,  
13 493 U.S. 215, 231 (1990). The Court must determine whether Litton Loan Servicing as agent for  
14 Residential Funding Real Estate Holding, LLC (or "Creditor") has standing to seek relief from stay.  
15

16 **1. Law:** For a federal court to have jurisdiction, the litigant must have constitutional standing,  
17 which requires an injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be  
18 redressed by the requested relief. *United Food & Commercial Workers Union Local 751 v. Brown*  
19 *Group, Inc.*, 517 U.S. 544, 551 (1996).

20 [T]he question of standing is whether the litigant is entitled to have the court decide  
21 the merits of the dispute or of particular issues. Standing doctrine embraces several  
22 judicially self-imposed limits on the exercise of federal raising another person's legal  
rights . . . . .

23 Typically . . . The standing inquiry requires careful judicial examination of a  
24 complaint's allegations to ascertain whether the particular plaintiff is entitled to an  
adjudication of the particular claims asserted.

*Allen v. Wright*, 468 U.S. 737, 750-52 (1984) (citations omitted). Constitutional standing, predicated

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1 on the "case or controversy" requirement of Article III of the Constitution, is a threshold jurisdictional  
2 requirement, and cannot be waived. *Pershing Park Villas Homeowners Ass'n v. United Pacific Ins.*  
3 *Co.*, 219 F.3d 895, 899-900 (9th Cir. 2000).

4  
5 A litigant must also have "prudential standing," which stems from rules of practice limiting the  
6 exercise of federal jurisdiction to further considerations such as orderly management of the judicial  
7 system. *Pershing Park*, 219 F.3d at 899-900; *In re Godon*, 275 B.R. 555, 564-565 (Bankr. E.D. Cal.  
8 2002) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986)).

9 Generally, a party without the legal right under applicable substantive law to enforce the  
10 obligation at issue, or pursuing an interest outside those protected by the law invoked or abstract  
11 questions more appropriately addressed legislatively, lacks prudential standing. *Doran v. 7-Eleven,*  
12 *Inc.*, 524 F.3d 1034, 1044 (9th Cir. 2008).

13  
14 Under the Bankruptcy Code, a party seeking relief from stay must establish entitlement to that  
15 relief. § 362(d); see *In re Hayes*, 393 B.R. 259, 266-267 (Bankr. D. Mass. 2008). Foreclosure agents  
16 and servicers do not automatically have standing, *In re Scott*, 376 B.R. 285, 290 (Bankr. D. Idaho  
17 2007); *Hwang*, 396 B.R. at 767, and must show authority to act for the party which does.

18 In Washington, only the holder of the obligation secured by the deed of trust is entitled to  
19 foreclose. RCW 61.24.005(2) defines "beneficiary" under a deed of trust as the holder of the instrument  
20 or document evidencing the obligations secured by the deed of trust. See also *Fidelity & Deposit Co.*  
21 *Of Maryland v. Ticor Title Ins. Co.*, 88 Wash. App. 64, 943 P.2d 710 (1997). Having an assignment  
22 of the deed of trust is not sufficient, *id.* At 68-69, because the security follows the obligation secured,  
23 rather than the other way around. This principle is neither new nor unique to Washington:

24  
[T]ransfer of the note carries with it the security, without any formal assignment or  
delivery, or even mention of the latter.

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1 *Carpenter v. Longan*, 83 U.S. 271, 275 (1872).

2  
3 It follows that, to have standing, RFREH must establish that it is the holder of Debtors' note and  
4 Litton must establish its authority to act for the holder of Debtors' note.

5 **2. Evidence:** Some courts require, and this court should require, that a party moving for stay  
6 relief provide admissible evidence tracing the identity of the various holders and servicers of the  
7 mortgage or deed of trust in question, and the holders of the note evidencing the underlying obligation.  
8 See *Hayes*, 393 B.R. at 269; and *Parrish*, 326 B.R. at 720-21. The Court does not need to do that here  
9 because the Creditor's proof neither shows who presently holds Debtor's note nor its own authority.

10 While business records may provide the necessary proof, this exception to the hearsay rule  
11 requires that the records

- 12 (1) be made at or near the time by, or from information transmitted by, a person with  
13 knowledge;  
14  
15 (2) pursuant to a regular practice of the business activity;  
16  
17 (3) kept in the course of regularly conducted business activity; and  
18  
19 (4) the source, method, or circumstances of preparation must not indicate lack of  
20 trustworthiness.

21 These elements must be established by the testimony of a custodian or other qualified witness,  
22 and the documents must be authenticated. *In re Vinhnee*, 336 B.R. 437, 444 (9th Cir. BAP 2005).  
23 Specifically, "the record being proffered must be shown to continue to be an accurate representation of  
24 the record that originally was created." *Id.*; FRE 901(a).

A declarant authenticating business records must be qualified. The bare assertion that one  
works for the company and is familiar with its recordkeeping procedures is not sufficient: "there needs  
to be enough information presented to demonstrate that the person is sufficiently knowledgeable about

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1 the subject of the testimony." *Vinhnee*, 336 B.R. at 448 (citation omitted). The testimony must contain  
2 information warranting the conclusion that the proffered records are what they purport to be. Id.

3  
4 The only evidence which Litton has submitted is the declaration of one of its bankruptcy  
5 specialists named Nancy Rexford. The initial paragraph of the declaration reads:

6 "I am employed as a Bankruptcy Specialist for Litton Loan Servicing LP the  
7 loan servicing agent ("Servicer") for Residential Funding Real Estate  
8 Holding, LLC ("Creditor"). I am familiar with the process by which Servicer  
9 maintains its loan records. I am competent to review loan records and  
10 evaluate status based upon those records. I personally know that the records  
11 kept are in the course of regularly conducted business and are a matter of the  
12 business routine. Entries in the records are made at or near the time of the  
13 event recorded by or with information from a person with knowledge of the  
14 event recorded."

15 Declaration of Nancy Rexford in Support.

16 Ms. Rexford makes no claim that any of the matters to which she testifies are matters found  
17 within the business records of her employer, Litton Loan Servicing, or for that matter, the records of  
18 Litton's principal, Residential Funding Real Estate Holding, LLC. (RFREH)

19 It is patently obvious that declarant Rexford has no admissible basis for her inadmissible legal  
20 conclusions and hearsay statements, including the following:

- 21 • "[O]n December 22, 2000, the debtor executed and delivered a Note to Mortgage  
22 Market, Inc." [hearsay not within the business record exception]
- 23 • "The Note represents the debtor's promise to pay \$272,000.00 to Mortgage Market, Inc."  
24 [a legal conclusion which the bankruptcy specialist is not qualified to express]
- "Mortgage Market, Inc., specially indorsed the Promissory Note to Prism Mortgage  
Company." [hearsay not within the business record exception]
- "Prism Mortgage Company specially indorsed the Promissory Note to Countrywide  
Home Loans, Inc." [hearsay not within the business record exception]

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- “Countrywide Home Loans, Inc. indorsed the Promissory Note in blank.” [hearsay not within the business record exception]
- “Creditor is now the holder of the Original Promissory Note executed by the debtor on December 22, 2000.” [a legal conclusion]

Significantly, no business records of Litton or RFREH are actually proffered as evidence in support of the motion. Declarant Rexford merely recounts her conclusions. She doesn’t even claim to be a custodian of any of the unidentified records she states she has reviewed.

When was bankruptcy specialist Rexford hired by Litton? When did Litton become the servicer for RFREH? When and from whom did RFREH, or Litton for that matter, acquire any of the records bankruptcy specialist Rexford purports to have reviewed? Specifically, which documents and entries in the purported records did she review and why should we believe that said documents qualify as business records of Litton?

Debtor hereby objection to admissibility of bankruptcy specialist Rexford's formulaic recitation in attempts to satisfy FRE 901(a). Nothing meaningful is stated regarding the declarant's qualifications to authenticate business records or the reliability of those records in this instance. She doesn’t even identify which records she has consulted.

Which of the matters she recounts does she knows to be true of her own knowledge? Which did she gain from someone's business records?

Bankruptcy specialist Rexford does not assert that either RFREH, or Litton, is in possession of the original promissory note. Nor does she assert that the unauthenticated copy attached to her declaration is a copy of the original rather than merely a copy of a copy which, based on its appearance, is plainly what it is. If it is merely a copy of a copy, then who has possession of the original?

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1 Nothing in the record establishes Litton's authority to enforce the Debtors' note, for whomever  
2 holds it, and thus to foreclose the deed of trust. The declaration states that Litton Loan Servicing is  
3 "servicing agent," a term with no uniform meaning, and no definition cited.  
4

5 At a minimum, there must be an unambiguous representation or declaration setting forth the  
6 servicer's authority from the present holder of the note to collect on the note and enforce the deed of  
7 trust. If questioned, the servicer must be able to produce and authenticate that authority.

8 Debtor hereby questions Litton's authority to collect the note and enforce the deed of trust.

9 Litton has not shown that (1) Residential Funding Real Estate Holding, LLC, is holder of the  
10 Debtor's note, nor (2) that it has standing to bring the motion for relief from stay or authority to act for  
11 whomever does.  
12

### 13 V. CONCLUSION

14 The motion for relief from stay should be denied.

15 Debtor should be awarded his attorney fees in the amount of \$2,000.00 for having to respond to  
16 this motion.

17 DATED this 19<sup>th</sup> day of February, 2010.  
18

19 /s/ Helmut Kah  
20 Helmut Kah, WSBA # 18541  
21 Attorney for the Debtor  
22  
23  
24